

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE L. NARVAEZ)	
Claimant)	
VS.)	
)	Docket No. 181,197
EXCEL CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent requested review of the Award dated January 31, 1996, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on June 4, 1996.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the respondent. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Also, at oral argument and in its brief, respondent advised the Appeals Board that the 122.71 weeks of permanent partial disability benefits shown in the Award should not be credited against the benefits due in this docket number because they relate to a different claim.

ISSUES

The Assistant Director awarded claimant permanent partial disability benefits based upon a 5 percent whole body functional impairment and a 49.5 percent work disability. Respondent requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record, the Appeals Board finds as follows:

The Award entered by the Assistant Director should be modified to reflect the parties' stipulation that the permanent partial disability benefits shown in the Award should not be credited against the benefits due in this proceeding.

Claimant injured his left shoulder while working for the respondent in November 1992 and ultimately underwent left shoulder surgery in September 1993. While recuperating from surgery respondent provided claimant with light work.

When claimant received his permanent work restrictions from the surgeon, J. Mark Melhorn, M.D., respondent took those restrictions and walked claimant through both the slaughter and fabrication sides of its meat processing plant to attempt to identify a job which claimant could perform. Because of the combination of claimant's medical restrictions from Dr. Melhorn and claimant's relatively low seniority, only one job was identified as appropriate, the intestine defatter job.

Claimant was given two weeks to learn the intestine job and develop the proficiency to meet respondent's qualification requirements. On March 18, 1994, claimant qualified in his new position. On March 31, 1994, claimant advised his supervisor the job was causing an increase in his symptoms. When claimant qualified for the intestine job, respondent advised him he would be terminated if he could not perform the job. True to its word, on March 31, 1994, respondent sent claimant home and terminated him.

For the period following termination, claimant contends he is entitled to permanent partial disability benefits based upon a work disability. On the other hand, respondent contends claimant refused to perform the accommodated job and, thus, his benefits should be limited to the functional impairment rating. The Assistant Director found claimant made a reasonable attempt to perform the intestine job and, therefore, found claimant entitled to a work disability. The Appeals Board agrees with that analysis and conclusion.

Dr. Melhorn placed permanent medical restrictions on claimant of medium work only with no lifting or carrying more than 50 pounds; limited frequent lifting and carrying to 25 pounds; prohibited use of either hand over the shoulders; and prohibited work involving hooks, knives, or scissors. Although before his deposition Dr. Melhorn viewed the

videotape of the intestine job and testified that it appeared to fall within the medical restrictions he placed upon claimant, the doctor also stated each individual was unique and additional evaluation might be necessary if claimant experienced symptoms from that work. Because the doctor last saw claimant in January 1994, Dr. Melhorn did not have the opportunity to evaluate claimant when he was performing that job and complaining of increased symptoms.

At claimant's attorney's request, Ernest R. Schlachter, M.D., evaluated claimant in February 1994. Dr. Schlachter diagnosed aggravation of preexisting degenerative arthritis at both the C4-5 and C5-6 intervertebral levels with chronic sprain, partial ankylosis of the left shoulder following rotator cuff repair, and left rotator cuff tendonitis. He testified claimant should limit repetitive lifting to less than ten pounds with the left arm; limit single lifts to less than 20 pounds with the left arm; avoid pushing and pulling with the left shoulder; avoid using the left arm above horizontal; avoid work requiring claimant to turn his head sharply; avoid overhead work; and avoid work where he is required to flex his neck for prolonged periods.

Robert A. Rawcliffe, M.D., whom an administrative law judge selected to perform an independent medical evaluation, examined claimant in August 1994. Dr. Rawcliffe wrote in his medical report that his evaluation revealed claimant had sustained a rotator cuff tear of the left shoulder, had supraspinatus tendonitis in the right shoulder, and had symptoms suggestive of carpal tunnel syndrome. He provided a permanent functional impairment rating for the torn rotator cuff only, and found no objective evidence for impairment involving the cervical spine, wrists, or hands. Dr. Rawcliffe indicated claimant should observe the following medical restrictions: no lifting above mid-chest level with either arm; limit occasional lifting to less than 20 pounds with either arm; limit frequent lifting to less than ten pounds; and avoid all activities which require overhead reaching.

The greater weight of the evidence indicates the intestine job would not violate Dr. Melhorn's restrictions; however, it would violate Dr. Schlachter's restrictions against pulling with the left shoulder. Because the job required claimant to pull intestines from a trough located at chest level, there is some question whether Dr. Rawcliffe might recommend against it in light of his restriction against lifting above mid-chest level.

Based upon the entire record, the Appeals Board agrees with the Assistant Director's analysis and conclusion that claimant attempted to perform the intestine job, experienced increased symptomatology, reported those problems to respondent, and was terminated. Because claimant put forth reasonable effort to perform the job, the guiding principles set forth in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), are not applicable.

The Assistant Director found claimant was entitled to permanent partial disability benefits for a 5 percent whole body functional impairment up through his termination on March 31, 1994. After that date the Assistant Director based claimant's permanent partial

disability benefits upon a 49.5 percent work disability. The Appeals Board agrees with that analysis and adopts it as its own.

The Appeals Board finds for the period before March 31, 1994, when claimant returned to work for the respondent and earned comparable wages, claimant's permanent partial disability benefits are to be based upon the functional impairment rating. However, after March 31, 1994, claimant is entitled to a work disability. See K.S.A. 1992 Supp. 44-510e.

Only one labor market expert testified, claimant's expert Jerry D. Hardin. He testified claimant lost 55 to 60 percent of his ability to perform work in the open labor market considering Dr. Schlachter's medical restrictions, lost 35 to 40 percent of the same ability considering Dr. Melhorn's restrictions, and lost 70 percent considering Dr. Rawcliffe's restrictions. He believes claimant retains the ability to earn \$240 per week under Dr. Schlachter's and Dr. Melhorn's restrictions but only \$200 per week under Dr. Rawcliffe's.

The Assistant Director was persuaded by Mr. Hardin's testimony that claimant, as a result of his work-related accident, lost 44 percent of his ability to earn a comparable wage and 55 percent of his ability to perform work in the open labor market. Averaging those losses, the Assistant Director found claimant had a 49.5 percent work disability after March 31, 1994. The Appeals Board finds the Assistant Director's analysis to be proper and adopts it as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated January 31, 1996, entered by Assistant Director Brad E. Avery should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jose L. Narvaez, and against the respondent, Excel Corporation, for an accidental injury which occurred November 1, 1992, and based upon an average weekly wage of \$428.33 for 73.57 weeks at the rate of \$14.28 per week or \$1,050.58, for a 5% permanent partial disability through March 31, 1994, followed by 341.43 weeks at the rate of \$141.35 per week or \$48,261.13 for a 49.5% permanent partial general disability, making a total award of \$49,311.71.

As of May 20, 1997, there is due and owing claimant 73.57 weeks of permanent partial compensation at the rate of \$14.28 per week in the sum of \$1,050.58 and 163.72 weeks of permanent partial general disability compensation at the rate of \$141.35 per week in the sum of \$23,141.82 for a total of \$24,192.40, which is ordered paid in one lump

sum less any amounts previously paid. The remaining balance of \$25,119.31 is to be paid for 177.71 weeks at the rate of \$141.35 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Award entered by the Assistant Director to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Randall D. Grisell, Garden City, KS
Office of Administrative Law Judge, Garden City, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director